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Information Sharing in the Trump Administration

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As January 20, 2025, approaches, antitrust practitioners and the business communities are searching for clues whether the incoming Trump Administration and its antitrust officials will continue the Biden Administration's approach to the exchange of competitively sensitive information, particularly through the use of algorithmic software. The Biden antitrust enforcers staked out in litigation, advocacy, and court filings in private lawsuits a strong position against "algorithmic price fixing" and the use of artificial intelligence ("AI") models and software to facilitate the exchange of competitively sensitive information amongst competitors—especially as AI grows increasingly more complex and enhances its facilitation of more granular, refreshed, and accurate data sharing among industry participants. This activity has clouded the previous rules regarding information exchanges and complicated counseling advice on what types of information can be shared amongst competitors and how to minimize antitrust risk when engaging in such activities. We expect this shift to continue as AI grows increasingly more complex in its ability to facilitate information sharing.

Section 1 of the Sherman Act outlaws contracts, combinations, and conspiracies in restraint of trade.[1] In the antitrust cases, successfully pleading a Section 1 violation has traditionally required that an antitrust plaintiff allege, and then ultimately prove, that there was an agreement amongst competitors which unreasonably restrained trade (i.e., was anti-competitive). An agreement under Section 1 can be explicit or implicit.[2] For example, "hub-and-spoke" conspiracies, where one central firm acts "in the center as the ringmaster" in facilitating the conspiracy between horizontal competitors can be found to constitute a horizontal agreement.[3]

As discussed below, the DOJ under the Biden Administration has taken the position in the past two years that longstanding antitrust principles barring competitors from using a human agent as a conduit for fixing prices apply equally to the use of software algorithms to set prices when the algorithm's pricing recommendations analyze information from multiple competitors. Specifically, in a recent amicus brief in the Ninth Circuit, the DOJ set out its views in some detail:

- The Sherman Act covers all forms of combination, old and new, and reaches horizontal price-fixing arrangements involving pricing algorithms.[4]
- A violation of the law does not require an agreement to follow the pricing algorithm's recommendations; to the DOJ an agreement among competitors to use certain pricing algorithms to generate default or "starting point" prices is per se illegal even if there is no further agreement on final prices.[5]
- Concerted action, or conduct which joins separate independent decisionmakers and deprives the marketplace of independent centers of decision, is sufficient to allege a horizontal "contract, combination, or conspiracy" under Section 1.[6]
- The practical effect of vertical agreements with a third party to use its pricing algorithm, even where defendants' ability to set prices is not restrained by the terms of the agreement, can violate the rule of reason.[7]

The Biden Administration's Evolving Position on Algorithmic Price Fixing

The Biden antitrust agencies' position did not spring full-blown into public view in its recent court filing. It evolved over the past two years—beginning with the withdrawal of longstanding information-sharing guidance and continuing in two lawsuits from the DOJ regarding information sharing in the poultry industry and the use of pricing software by landlords to set rental rates.

In February 2023, the DOJ withdrew several policy statements related to antitrust enforcement in health care markets, noting that the evolved health care landscape rendered the statements outdated and inconsistent with current market realities.[8] The policy statement on information sharing was widely regarded as applicable across industries. The FTC under Chair Lina Khan shortly followed suit.[9] The withdrawn policy statements provided antitrust "safety zones" which described circumstances under which the antitrust agencies would not challenge exchanges of competitively sensitive information in the health care industry[10] and were used as guardrails to mitigate antitrust risk by firms in other industries when engaging in information sharing activities.

The day before the announcement of the withdrawal, Antitrust Division Deputy AAG Doha Mekki offered insights into the Division's thinking as to why they had concluded that the information safe harbors were obsolete:

> *In some industries, high-speed, complex algorithms can ingest massive quantities of "stale," "aggregated" data from buyers and sellers to glean insights about the strategies of a competitor. Where that happens the distinctions between past and current or aggregated versus disaggregated data may be eroded.*
>
> *Where competitors adopt the same pricing algorithms, our concern is only heightened. Several studies have shown that these algorithms can lead to tacit or express collusion in the marketplace, potentially resulting in higher prices, or at a minimum, a softening of competition. . . .*
>
> *Indeed, we are experiencing an inflection point in the use of algorithms, data at scale, and cloud computing. Additional changes are inevitable and likely to come in rapid succession. That is why it is important to revisit outdated guidance before it strays even further from market realities.*[11]

Since the withdrawal of these policy statements, the antitrust agencies have been active in challenging "algorithmic price fixing" to the point where the DOJ now argues for the application of antitrust per se illegality to the use of pricing software and algorithms to set base prices.

- **DOJ sues Agri Stats –** In September 2023, the DOJ sued Agri Stats, a middleman which creates and distributes comprehensive reports using competitively sensitive information collected from meat processors, for violations of Section 1 of the Sherman Act.[12] The complaint contains traditional Section 1 allegations that Agri Stats entered into anticompetitive agreements to share competitively sensitive information amongst processors in the chicken, pork, and turkey industries.[13]

- **RealPage Class Action Antitrust Litigation –** In November 2023, the DOJ filed a statement of interest in the RealPage antitrust litigation,[14] where class action plaintiffs alleged that several corporate landlords coordinated to drive up rent prices by using RealPage's revenue management software to set prices. The DOJ contended that the conduct at issue in the class action is per se unlawful price fixing because the defendants "knowingly combine[d] their sensitive, nonpublic pricing and supply information in an algorithm that they rely upon in making pricing decisions, with the knowledge and expectation that other competitors will do the same."[15]

- **Multifamily Rental Prices Class Action –** The FTC and DOJ in March 2024 filed a joint statement of interest in a class action alleging competing landlords violated Section 1 of the Sherman Act by agreeing to use Yardi Systems' pricing algorithm to artificially inflate multifamily rental prices.[16]In the brief, the agencies again take the position that the per se rule applies to price fixing using algorithms and that concerted action can be shown by an invitation plus conduct showing acceptance.[17]

- **Vegas Strip Hotel Price-Fixing Case –** In the same month, the agencies filed a joint statement of interest in one of two recent class action litigations against Vegas Strip and Atlantic City hotels alleging use of software products to set room rates.[18] The antitrust agencies took the position that algorithmic price fixing is a per se violation of Section 1 of the Sherman Act and "fixing the starting point of prices is per se illegal, even if ultimate prices may deviate."[19] In May, the suit against the Vegas hotels was dismissed with prejudice because the plaintiffs did not plausibly allege a tacit agreement between the defendants or a restraint of trade.[20] The court noted that the mere use of an AI pricing algorithm without any allegation of an explicit or implicit agreement amongst the competitors to accept the prices the algorithm recommends does not plausibly allege an illegal agreement or raise a reasonable expectation that one will be revealed in discovery sufficient to survive a motion to dismiss.[21] Likewise, the similar case against Atlantic City casino-hotels was dismissed five months later because the hub-and-spoke conspiracy pled was nearly identical to the Vegas Strip case and, among other reasons, the court noted that the plaintiffs' unique antitrust theory was factually and legally incomplete.[22] The court reasoned that the plaintiffs complaint does not allege that the defendants' proprietary data was pooled or otherwise commingled into a common dataset against which the algorithm runs, and the complaint dances around this fact without ever alleging that the pricing recommendations are based

off of pooled confidential competitor data.[23] The court refused to infer a plausible implicit price-fixing agreement between the defendants from the mere fact that they all use the same pricing software.[24] Both dismissals were careful to distinguish the case at hand from the RealPage multidistrict litigation, where plaintiffs alleged that RealPage's revenue management software inputs a melting pot of confidential competitor information through its algorithm and spits out price recommendations based on that private competitor data—without commenting on the merits of the litigation. It is in the Ninth Circuit appeal of the Las Vegas case where DOJ staked out its detailed views discussed above.

- **DOJ sues RealPage under both sections of the Sherman Act –** In August 2024, the DOJ filed its own antitrust lawsuit against RealPage, alleging that it violated Section 1 of the Sherman Act by sharing information for use in competitors' pricing and entering into vertical agreements with landlords to align pricing and also monopolized the commercial revenue management software market in violation of Section 2 of the Sherman Act.[25] The complaint alleges RealPage uses nonpublic, competitively sensitive data to train its algorithms and generate price recommendations and subsequently uses multiple mechanisms to increase compliance with its pricing recommendations by landlords.[26]

- **Pork Antitrust Litigation –** The DOJ filed another statement of interest in a case where pork producers are accused of exchanging detailed and nonpublic competitively sensitive information about prices, capacity, sales volume, and demand through Agri Stats (an information-sharing service that provided benchmarking reports to the producers). The DOJ advocates in the statement that information sharing alone can violate Section 1 absent proof of an agreement to fix prices and even information exchanges that include only aggregated or anonymized data can violate the antitrust laws.[27] While this case is not directly related to algorithmic price fixing, the DOJ noted in the statement its interest in information sharing claims generally due to its two ongoing litigations against both Agri Stats and RealPage.[28] This illustrates the shift in historic information sharing guidance from the antitrust agencies in an effort to adapt and make consistent with the agencies' position on rapidly-growing AI technology.

- **Gibson Appeal –** The DOJ most recently filed an amicus brief in support of plaintiffs in the Vegas Strip Hotels case appeal, arguing that concerted action can be shown through an invitation for collective action followed by conduct showing acceptance and that the district court made a legal error by construing the statutory phrase to require that the challenged agreements "eliminate all pricing discretion."[29] The DOJ's position is that "[m]odern algorithms can process far more information than humans can—and at much greater speed"[30] and that concerted action among competitors to use a third party's pricing algorithm to engage in horizontal price fixing—even by setting merely a "default" or "starting-point" price—is per se unlawful.[31]

Where will the Trump Administration Come Down on these Antitrust Policy Questions?

While the facts and degree to which information exchange occurred in each of the above cases differ, in all of them, the current Administration has clearly contended that using an algorithm or pricing software as a conduit for the sharing of competitively sensitive information in order to set prices is per se illegal under the antitrust laws. No judicial decision has yet adopted the DOJ's position. The Biden DOJ's position that the safety zones in its older guidance documents no longer reflect current market realities and were "written at a time when information was shared in manila envelopes and through fax machines" rather than in the age of AI was a precursor to the forthcoming lawsuits and position that algorithmic facilitation of sharing competitively sensitive information and price setting violates the congressional intent and objective of Section 1.[32]

There really has not been any concrete indication what the new Administration antitrust officials' position on these issues is, i.e. whether unilateral use of an algorithm or pricing software, absent an explicit horizontal agreement to fix prices between competitors, constitutes a Section 1 violation.

The development of the Trump policy on algorithmic pricing faces two interrelated questions:

1. What exactly is necessary to meet the pleading and evidentiary requirements of a combination or conspiracy in restraint of trade that violates Section 1 of the Sherman Act?

2. How do algorithms and artificial intelligence fit into the framework that they decide (i.e., should these restraints be evaluated under a per se standard or the rule of reason)?

The new administration will inherit the DOJ's RealPage and Agri Stats litigation, so there will be an opportunity to see how this unfolds. The RealPage litigation is in its discovery phase, and fact discovery in the Agri Stats case is set to close on January 24, 2025, with dispositive motions due by July 2, 2025.[33] The Agri Stats case is set for a bench trial on October 2, 2025.[34]

Overall, the rules of the road for exchanging competitively sensitive information are shifting. Government enforcers may be facing a moving target as AI evolves and grows increasingly complex. Parties engaged in sharing any information with a competitor should contact antitrust counsel prior to sharing information that could invite antitrust risk. Any party considering using a pricing or revenue management software or other third party to facilitate information sharing should engage antitrust counsel at the outset to discuss the details of the product, the way the party intends to use it, and the risks of liability resulting from making pricing decisions based on AI tools and technology or other third-party reports. If you have a question about information sharing, please contact one of the individuals above or your regular Mintz attorney.

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[1] 15 U.S.C. § 1.

[2] *See United States v. General Motors Corp.*, 384 U.S. 127, 142-143 (1966).

[3] *See Toys 'R' Us v. FTC,* 221 F.3d 928, 936 (7th Cir. 2000).

[4] *See* Brief for the United States as Amicus Curiae in Support of Plaintiffs-Appellants at 13 ("DOJ Amicus Brief"), *Gibson et al. v. Cendyn Group, LLC* (9th Cir. Oct. 24, 2024), available **here**.

[5] *Id.* at 14-15.

[6] *Id.* at 15.

[7] *Id.* at 29-33.

[8] Justice Department Withdraws Outdated Enforcement Policy Statements, Press Release (Feb. 3, 2023), available **here**; *see also* Principal Deputy Assistant Attorney General Doha Mekki of the Antitrust Division Delivers Remarks at GCR Live: Law Leaders Global 2023 ("Mekki Remarks"), Speech (Feb. 2, 2023), available **here**.

[9] Federal Trade Commission Withdraws Healthcare Enforcement Policy Statements, FTC Announcement (July 14, 2023), available **here**.

[10] *See, e.g.*, Department of Justice and FTC Antitrust Enforcement Policy Statements in the Health Care Area, Press Release (Sept. 15, 1993) (withdrawn), available **here**.

[11] Mekki Remarks.

[12] Complaint, *United States v. Agri Stats, Inc.*, Case No. 0:23-CV-03009 (D. Minn. Sept. 28, 2023).

[13] *Id.* at 42.

[14] *See* Memorandum of Law in Support of the Statement of Interest of the United States, *In Re: RealPage, Rental Software Antitrust Litigation (No. II)*, Case No. 3:23-MD-03071 (M.D. Tenn. Nov. 15, 2023), available **here**.

[15] *Id.* at 15.

[16] Statement of Interest of the United States of America, *Duffy et al. v. Yardi Systems, Inc.*, Case No. 2:23-CV-01391 (W.D. Wash. Mar. 1, 2024), available **here**.

[17] *Id.* at 8-12.

[18] *See Gibson v. Cendyn Group LLC et al.*, Case No. 2:23-CV-00140 (D. Nev.) (dismissed with prejudice May 5, 2024); *Cornish-Adebiyi et al. v. Caesar's Entertainment, Inc.*, Case No. 1:23-CV-02536 (D.N.J.) (dismissed with prejudice Sept. 30, 2024). Plaintiffs in the *Gibson* case have appealed to the Ninth Circuit. Plaintiffs in the *Cornish-Adebiyi* case have filed a notice of appeal to the Third Circuit.

[19] Statement of Interest of the United States, *Cornish-Adebiyi et al. v. Caesar's Entertainment, Inc.*, Case No. 1:23-CV-02536 (D.N.J. Mar. 28, 2024), available **here**.

[20] Order, *Gibson v. Cendyn Group et al.*, Case No. 2:23-CV-00140 (D. Nev. May 8, 2024), available **here**.

[21] *Id.* at 12.

[22] Slip Opinion, *Cornish-Adebiyi et al. v. Caesar's Entertainment, Inc.*, Case No. 1:23-CV-02536 (D.N.J. Sept. 30, 2024), available **here**.

[23] *Id.* at 10.

[24] *Id.* at 13.

[25] Complaint, *United States of America et al. v. RealPage, Inc.*, Case No. 1:24-CV-00710 (M.D.N.C. Aug. 23, 2024), available **here**.

[26] *Id.* at 7, 23.

[27] Statement of Interest of the United States, *In Re Pork Antitrust Litigation*, Case No. 0:18-CV-01776 (D. Minn. Oct. 1, 2024), available **here**.

[28] *Id.* at 2.

[29] DOJ Amicus Brief.

[30] *Id.* at 12.

[31] *Id.* at 23.

[32] *See* Mekki Remarks.

[33] *See* Pretrial Scheduling Order, *United States v. Agri Stats, Inc.*, Case No. 0:23-03009 (D. Minn. June 26, 2024).

[34] *Id.*

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